No. 758

JAN 19 1946

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1945.

CLARENCE A. TIMONY, suing on behalf of himself and as agent on behalf of other former employees of TODD ERIE BASIN DRY DOCKS, INC., and on behalf of himself and other employees of TODD SHIPYARDS CORPORATION, similarly situated,

Petitioner,

AGAINST

TODD SHIPYARDS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

HERBERT GOLDMARK,
JOSEPH K. GUERIN,
Counsel for Petitioner.

INDEX.

PAGE

PETITION:

Summary Statement of the Matter Involved 2
Jurisdiction 5
Questions Presented 5
Reasons Relied on for Allowance of the Writ 5

BRIEF:

POINT I.—The Maximum Hours Provision in Section 7 of the Fair Labor Standards Act presupposes that work will not be exacted for the maximum eight hours a day or forty hours a week, upon which the employee's straight time base rate of pay is calculated, without the customary time off for lunch or supper, unless a premium is paid for such overtime 7

POINT II.—It is a violation of the humanitarian purposes of the Act to deny an employee an opportunity for lunch or supper without paying him a premium 10

POINT III.—In any event, evidence should have been taken as to whether a failure to have a meal period after five hours of continuous work, had a detrimental effect on the health of the employees 14

POINT IV.—As the Fair Labor Standards Act does not expressly provide a remedy for the violation complained of, the contract furnishes the measure of damages 15

POINT V.—Whether respondent violated the Fair Labor Standards Act could not be a subject of arbitration 16

CONCLUSION 19

CASES CITED.

	PAGE
Amberg v. Kinley, 214 N. Y. 531, 535	16
Armour & Co. v. Wantock, 323 U. S. 126	15
Baxter v. McGee, 87 F. (2d) 702 (CCA 8th)	12
Bowie v. Gonzalez, 117 F. (2d) 11, 16 (CCA 1st)	13
Brown v. Piper, 91 U. S. 37, 42	8
Bryan v. Burns, 208 N. Y. App. Div. 398	8
Castaing v. Puerto Rican American Sugar Refinery Inc., 145 F. (2d) 403 (CCA 1st)	14
Chotapeg, Inc. v. Bullowa, 291 N. Y. 70, 73, 74	16
Commissioner v. Gooch Co., 320 U. S. 418, 419	6
Davila v. Porto Rico Light & Power Co., 143 F. (2d) 236 (CCA 1st)	14
Donahue v. Susquehanna Collieries Co., 138 F. (2d) 3	6, 18
Falbo v. U. S., 320 U. S. 549, 551	6
Fleming v. Hawkeye Pearl Button Co., 113 F. (2d) 52 (CCA 8th)	13
Fleming v. Warshawsky, 123 F. (2d) 622 (CCA 7th)	10, 13
Gatliff Coal Co. v. Cox, 142 F. (2d) 876, 882	6, 17, 18
Hurn v. Ousler, 289 U. S. 238	4
J. F. Fitzgerald Construction Co. v. Southbridge Water Supply Co., 304 Mass. 130, 134	19
Latter v. Holsum Bread Company, 160 Pac. (2d) 421, Sup. Ct. of Utah (June 1945)	17
Matter of Benedict, 265 App. Div. 518	19
Meacham v. Jamestown F. & C. R. R. Co., 211 N. Y. 346	17
Muller v. Oregon, 208 U. S. 412	8, 14
Murray Oil Products Co. v. Mitsui & Co. Lim., 146 F. (2d) 381, 383 (CCA 2d)	17

PAGE

National Contracting Co. v. Hudson River Water Power Co., 192 N. Y. 209 17

Parry v. Bache, 125 F. (2d) 493 (CCA 5th) 17
People v. Realmato, 294 N. Y. 45, 49 12
Price v. Forrest, 173 U. S. 410 10

Racine v. Morris, 201 N. Y. 240 16
Roberts v. U. S., 320 U. S. 264, 265 5

Skidmore v. Swift & Co., 323 U. S. 134 ..... 8, 15
State v. Loy, 299 N. W. 908 (Sup. Ct. of North Dakota, 1941) 19
Stratton v. Farmers Produce Co. Inc., 134 F. (2d) 825 (CCA 8th) 14
S. E. C. v. Joiner Corp., 320 U. S. 344, 345 5

Tennessee Coal, Iron & Railroad Co. v. Muscoda Local, 321 U. S. 590 ..... 6, 13, 15
Thygerson v. Whitbeck, 5 Utah 406; 16 P. 403 19

U. S. v. Darby, 312 U. S. 100, 109 10
U. S. v. Katz, 271 U. S. 354 12

Walling v. La Belle S. S. Co., 148 F. (2d) 198 (CCA 6th) 17
West Coast Hotel Co. v. Parrish, 300 U. S. 379 ... 8
Wiles v. Peck, 26 N. Y. 42 19
Wiley v. Mulledy, 78 N. Y. 310 16
Williams v. Terminal Co., 315 U. S. 386 10

Zip Mfg. Co. v. Peh Mfg. Co., 44 F. (2d) 184 (D. C. of Del.) 19

AUTHORITIES AND STATUTES CITED.

U. S. Arbitration Act, 9 U. S. C. A., Sec. 2 ..... 5, 6
29 U. S. C. A., Section 202 10
Congressional Record, Vol. 81, page 7648 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

CLARENCE A. TIMONY, suing on behalf of himself and as agent on behalf of other former employees of TODD ERIE BASIN DRY DOCKS, INC., and on behalf of himself and other employees of TODD SHIPYARDS CORPORATION, similarly situated,

Petitioner,

AGAINST

TODD SHIPYARDS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

Clarence A. Timony, suing on behalf of himself and as agent on behalf of other former employees of Todd Erie Basin Dry Docks, Inc. and on behalf of himself and other employees and former employees of Todd Shipyards Corporation, similarly situated, prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered on the 31st day of October, 1945, affirming the judgment of the District Court of the United States for the Southern District of New York entered March 7th, 1945, which dismissed the amended complaint herein.

Summary Statement of the Matter Involved.

The amended complaint was dismissed on motion by Judge Alfred C. Coxe, District Judge, for lack of jurisdiction (Opinion, R. pp. 50-55). The Circuit Court of Appeals affirmed the judgment of dismissal upon said opinion of the District Judge (R. p. 63).

The amended complaint contains three causes of action. In the first cause of action it is alleged that the respondent and its predecessor, Todd Erie Basin Dry Docks, Inc. were engaged in the production, repairing and converting of ships used in interstate commerce (R. p. 5) and that the petitioner and the other employees on whose behalf he is suing, were guards, whose occupation was necessary for the production of such ships in interstate commerce (pp. 5 and 6).

It is then alleged that on or about January 16th, 1942, an agreement was made between Todd Erie Basin Dry Docks Inc. and the Industrial Union of Marine & Shipbuilding Workers of America, Local No. 39, as the sole and exclusive collective bargaining agency of certain of the employees of said Todd Erie Basin Dry Docks Inc., including the plaintiff and said other employees, whereby it was agreed, among other things, that, if said employees employed by said Todd Erie Basin Dry Docks Inc., or by any successor thereof, were required to work continuously more than five hours without an opportunity for lunch or supper, as the case might be, such employees should be entitled to receive a premium for all time worked beyond such five hours at the rate of one-half of the regular straight time base rate of pay of such employees until said employees had an opportunity for lunch or supper, at which time such right to such premium should end (R. p. 9).

The petitioner's base rate of pay is then stated and it is alleged that on the days set forth in Exhibit A, annexed to said amended complaint, he was required to work con-

tinuously for more than five hours without an opportunity for lunch or supper, by virtue of which he became entitled to recover the sum of $807.30 (R. p. 10).

Petitioner then alleged that he is suing on behalf of the 220 other employees, whose names are contained in Exhibit B, annexed to said amended complaint, who also worked continuously more than five hours on various days without an opportunity for lunch or supper and that the amounts that they are entitled to recover would be proved at the trial (R. pp. 10 and 11).

In the second cause of action the paragraphs "First" to "Twelfth", inclusive, of the first cause of action are incorporated by reference and it is then alleged that the agreement referred to in the first cause of action was made, in pursuance of the Fair Labor Standards Act of 1938, which became a part of said agreement, in that a requirement that employees should work for more than five hours continuously without an opportunity for lunch or supper was in violation of the purpose of said Act (R. p. 12); that the employment of petitioner and said other employees, as alleged in the first cause of action, without such opportunity for lunch or supper, was a violation of said Act (R. p. 13) and, therefore, petitioner was entitled to recover not only said sum of $807.30, but a like amount as liquidated damages under said Act, together with a reasonable attorney's fee, in pursuance of Section 16 (b) of said Act (R. pp. 13 and 14).

The third cause of action alleges a violation of the Labor Law of the State of New York by the respondent and its predecessor in failing to furnish petitioner and said other employees with such opportunity for lunch or supper midway between the beginning and end of his employment.

No diversity of citizenship is alleged in the amended complaint and petitioner conceded in the District Court and in the Circuit Court of Appeals that the second cause

of action alleging a violation of the Fair Labor Standards Act, furnished the only basis for jurisdiction by the District Court.

Judge Coxe in his opinion held that the amended complaint did not charge a violation of the Fair Labor Standards Act, because the allegations that the petitioner was required to work over five hours without an opportunity for supper, do not state a claim "for unpaid minimum wages or unpaid overtime compensation under Section 16 (b) of the Fair Labor Standards Act" (p. 55).

Petitioner further contended in the Courts below that even if the Court found that there had been no violation of the Fair Labor Standards Act, the Court should, nevertheless, retain jurisdiction to determine the first and third causes of action under the doctrine of *Hurn* v. *Oursler*, 289 U. S. 238. The District Judge held that, as the allegations charging a violation of the Fair Labor Standards Act were "plainly wanting in substance" there was no possible basis for invoking the doctrine of that case (p. 55).

Respondent also moved to dismiss the amended complaint on the ground that the labor agreement referred to in the amended complaint contained a provision for arbitration of the claims asserted by the petitioner, that an arbitration thereof was in fact had, pursuant to the agreement and that an award was made determining the claims in favor of the respondent (R. pp. 21, 23 and 54).

The Court in its opinion recited such provision for arbitration and that such an award had been made (R. p. 54). It did not however, base its dismissal of the amended complaint on this ground, but solely on the ground that no cause of action had been stated for violation of said Fair Labor Standards Act.

Nevertheless, as respondent may refer to such arbitration, as justification for the dismissal of the amended complaint, we shall contend herein that the question

whether such act was violated could not be made the subject matter of a valid arbitration.

Jurisdiction.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925.

Questions Presented.

1. Whether the District Court did not err in holding that the failure to furnish petitioner with a lunch or supper period after five hours of continuous work did not violate the Fair Labor Standards Act.

2. Whether there could be a valid arbitration under the U. S. Arbitration Act, 9 U. S. C. A. Sec. 2, of the question whether such failure to furnish a lunch or supper period constituted a violation of said Fair Labor Standards Act.

Reasons Relied on for Allowance of the Writ.

The Writ should be granted for the following reasons:

1. It is of importance in the administration of the Fair Labor Standards Act, to have a determination by this Court, as to whether it covers only claims for unpaid minimum wages or unpaid overtime compensation, considered without reference to any other facts arising in connection with the performance of the work for which such compensation is earned.

This is a sufficient ground for granting the writ.

Roberts v. *U. S.*, 320 U. S. 264, 265;
S. E. C. v. *Joiner Corp.*, 320 U. S. 344, 345;

Commissioner v. *Gooch Co.*, 320 U. S. 418, 419;
Falbo v. *U. S.*, 320 U. S. 549, 551;
Tennessee Coal, Iron & Railroad Co. v. *Muscoda Local*, 321 U. S. 590.

2. It is important to determine whether the Fair Labor Standards Act does not by its very title and the humanitarian purpose for which it was enacted, condemn conduct obviously unfair on the part of an employer in failing to furnish employees with an opportunity for lunch or supper, without paying them for such deprivation.

3. It is important for this Court to determine whether in reaching a decision on this subject, it should take into consideration a universal custom, in harmony with the purposes of said Act, to grant a lunch or supper period to employees between the beginning and end of their daily work.

4. Because there is a conflict between the decisions of the 6th Circuit Court of Appeals in *Donahue* v. *Susquehanna Collieries Co.*, 138 F. (2d) 3 and the 6th Circuit Court of Appeals in *Gatliff Coal Co.* v. *Cox*, 142 F. (2d) 876, 882, as to the arbitrability under the U. S. Arbitration Act (9 U. S. C. A. Sec. 2) of the question whether the Fair Labor Standards Act has been violated.

It is important for this Court to determine the general question involved, which is constantly arising, whether a provision in a contract between an employer and employees, engaged in interstate commerce, to arbitrate future disputes arising out of such contract, is enforceable.

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Counsel for Petitioner.